United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1020

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

UNITED STATES OF AMERICA,

Appellee

Docket No. 76-1020

-against-

FRANKLIN WILLIAM GRASSI and
RAUL ARCE

Appellants
----------X

BRIEF ON BEHALF OF APPELLANT RAUL ARCE

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PRELIMINARY STATEMENT
UNDER SECOND CIRCUIT
RULE 28

After a jury trial before JUDGE JACOB MISHLER in the United States District Court for the Eastern District of New York, the appellant RAUL ARCE, was found guilty on Count 2 of the indictment and was sentenced on January 9, 1976 at which time the judgment of conviction was entered.

STATEMENT OF THE ISSUE

The issue in this case is whether or not the supplemental charge given to the jury by the Court while they were deliberating constitutes error.

STATEMENT OF THE CASE

RAUL ARCE was indicted with one JOSEPH LOUIS GARRO and FRANKLIN WILLIAM GRASSI, on a two count indictment charging them with bank robbery, armed and unarmed. The robbery was of the Astoria Federal Savings and Loan Association in Queens on March 14, 1975 in violation of Title 18 United States Code, Sections 2113 (a), 2113 (d) and 2. The trial began with a suppression hearing on November 17, 1975.

JOSEPH LOUIS GARRO testified for the government and said that he, ARCE and GRASSI planned the robbery of the bank in question. With a stolen automobile they robbed the bank on March 14, 1975 at which robbery they obtained $12,000.00 in cash and $8,000.00 in bonds. After the robbery the money was brought to the apartment of GRASSI and divided.

Testimony by a bank official was introduced to show the loss of approximately $20,000.00 after the robbery. A teller of the Astoria Federal Savings and Loan, one MARGARET CAYOUETTE, testified as to the facts of the robbery and could not identify either defendant. The owner of the car testified as to its theft and the security officer of a Korvette store testified as to the complaint of the theft by the owner of the car. He identified ARCE as one of two men he saw near Korvette's on March 13th, where the car was stolen. Another eye witness testified that on the morning of the bank robbery he saw three men leaving the parking lot of Astoria Federal Savings and Loan Association in the stolen car. An F.B.I. fingerprint specialist testified that he found ARCE'S fingerprints on a coffee container in the stolen car after the robbery.

The defendant ARCE did not take the stand nor were any witnesses called on his behalf. He was found guilty on the second count of the indictment and was sentenced to fifteen years.

POINT I

THE SUPPLEMENTAL CHARGE GIVEN BY THE COURT CONSTITUTES ERROR

The Court in the supplemental charge stated, (transcript P. 531) "(I) think you should know that if the jury fails to reach a unanimous verdict it means a declaration of a mistrial and a new trial, another jury will try the case, the lawyers in all probability will present a similar case to the jury.." Such language is similar to language before this Court in United States v. Domaneck 476 F 2d 1229, 1232 (1973, C.A. 2nd); cert. denied 414 U.S. 840. The Court stated that such language "is not to be commanded for general use" (476 F 2d at 1232), but in that particular instance was not unfairly coercive.

Appellant believes that such language as used by the Court in this case is coercive and prejudicial when coupled with the objections set out below.

The Court at no point in the supplemental charge explained to the jurors that they were not expected, in deference to other jurors, to abandon their conscientious convictions. This Court in United States v. Bowles, 428 F 2d, 592, 595 (1970, C.A. 2nd) cert. denied 400 U.S. 928, stated that the "typical 'Allen' charge" would be upheld "absent coercive circumstances and provided it was made clear that jurors were not to yield their conscientious convictions". No words approaching such an admonition were used in the present case.

Additionally, this Court in United States v. Kenner, 354 F 2d. 780 (1965, C.A. 2nd), cert. denied 383 U.S. 958, stated, while reviewing an "Allen" charge, that the case was saved from reversal by the barest margin because of, "the judge's disclaimer of intention to 'coerce' and by his expression of willingness to accept 'the ultimate decision' whatever it might be" 354 F 2d at 784. In the present case the Court neither disclaimed its intention to coerce the jury nor did it indicate its willingness to accept the ultimate decision of the jury.

In its supplemental charge, the Court did not mention the fact that the defendants could be found either innocent or guilty. The Court states only that the jury should "reach a unanimous verdict as to either defendant" (transcript p. 531). Such wording is coercive relative to the jury and prejudicial to the appellant. When the Court so charges, without using the word "innocent" at any point, it may well create a presumption in the minds of the jurors, that the judge, as a representative of the Federal Government, is indicating that the defendant should be found guilty. The omission of the instruction that the defendant

could be found innocent in conjunction with the supplemental charge was prejudicial to the defendant.

The American Bar Association, in "Standards Relating to the Administration of Criminal Justice" (Trial by Jury, Section 5.4) states that where there is a deadlocked jury, the Court's instructions should inform the jury that (iii) each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors and (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere prupose of returning a verdict.

No such instructions were given here. Additionally, the "Allen" charge has been replaced by the "modified" charge recommended by the American Bar Association (cite above) in three circuits. See United States v. Thomas 146 U.S. App. D.C. 101, 449 F 2d 1177, 1187 (1971); United States v. Fioravanti 412 F 2d 407, 420 (3rd Cir. 1969) cert. denied; Panaccione v. United States, 396, U.S. 837; United States v. Brown 411 F 2d 930 (7th Cir. 1969).

The First Circuit, as enunciated in United States v. Angiulo 485 F 2d 37, 39 (1973) has adopted rules promulgated in United States v. Flannery 451 F 2d 880 (1st Cir. 1971) which require that trial courts must balance a supplemental charge, so that the onus of re-examination would not vest on the minority alone.

POINT II

THE CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL

Respectfully submitted.

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